requiring decided affirmative relief, such as one of specific performance, would be open to attack for lack of jurisdiction.[7] Certainly no sovereign could order a partition [8] or sale [9] of foreign lands. The abatement of a foreign nuisance, also, would seem to be without the jurisdiction of a court of equity. Nevertheless a federal court sitting in Arizona recently granted an injunction against a tort of this character: the waste waters of the defendant's canal, the intake of which was in Mexico, were flooding the plaintiff's land in Arizona. *The Salton Sea Cases*, 172 Fed. 792 (C. C. App. Ninth Circ.). If property in Mexico had been damaged, so that the injury as well as the act causing it had taken place in the foreign territory, the weight of authority would be against such a decision.[10] Similarly specific reparation of a tort or breach of contract, necessitating the performance of acts on territory outside the jurisdiction of the court, should not be given.[11] The principal case, however, is fully supported by precedent.[12] And the distinction is clear; for, although it appeared that the defendant might act affirmatively in Mexico, the court did not actually decree any performance in Mexico; nor was an act in Mexican territory necessary to carry out the injunction, as stoppage of the waters could be made in Arizona. So the defendant in the suit could not successfully plead lack of jurisdiction; and the prevention of local injury fully justified a decree which the court knew would indirectly lead to affirmative action in Mexico. It is seen, therefore, that the limitation on the power of a court of equity arising from a foreign *situs* of the property in controversy is, in cases of affirmative relief, absolute, because of the resulting lack of jurisdiction in the sovereign state; while if negative relief is sought, the limitation becomes a mere question of expediency.[13]

DEBTOR OF THE ESTATE AS PERSONAL REPRESENTATIVE OF THE DECEDENT. — A claim in which obligor and obligee are one was, to the mind of the mediæval lawyer, unthinkable; and the appointment of a debtor as executor or administrator rendered a debt unenforceable.[1] In the case of the administrator such a result was so obviously beyond the contemplation of the decedent that its consequences were avoided by allowing the claim to be revived after the unity of its parties ceased.[2] The executor's

[7] The Port Royal R. R. Co. *v.* Hammond, 58 Ga. 523. (Specific performance refused.) It is to be noticed that the jurisdiction actually exercised by a sovereign must not be given undue weight when it affects foreign subjects or foreign territory, as then its validity must be tested by the law of all nations.

[8] Johnson *v.* Kimbro, 3 Head (Tenn.) 557. See cases collected in Binney's Case, 2 Bland 99, 145.

[9] Fall *v.* Eastin, 215 U. S. 1; Poindexter *v.* Burwell, 82 Va. 507. But a sale may be accomplished indirectly if the court has jurisdiction over a person who has power to make a conveyance. See note 6, *ante*.

[10] Mississippi & Missouri Ry. Co. *v.* Ward, 2 Black (U. S.) 485; People of N. Y. *v.* Central R. R. Co. of N. J., 42 N. Y. 283.

[11] It would seem that no court has attempted to grant such affirmative relief.

[12] Miller & Lux *v.* Rickey, 127 Fed. 573; J. P. Stillman & Co. *v.* White Rock Mfg. Co., 3 Wood. & M. 538; Willey *v.* Decker, 11 Wyo. 496. *Contra*, Morris *v.* Remington, *supra*.

[13] This distinction is not taken by text-writers. DICEY, CONFLICT OF LAWS, 2 ed., p. 204; POMEROY, EQUITY JURISPRUDENCE, 3 ed., ¶ 1318.

[1] Nedham's Case, 8 Co. 135 *a*.

[2] Hudson *v.* Hudson, 1 Atk. 460.

debt, however, was irrevocably gone, on the theory that the testator must have foreseen the legal consequence of his act.[3] But such a voluntary release by operation of law was not allowed to injure creditors;[4] from earliest times, where without it the assets were insufficient, the executor's obligation was kept alive for their benefit.[5] And in the case of a legacy directed by the will to be paid out of the claim against the executor, the law of a later period gave effect to the testator's wishes.[6]

That even where the will contains no such direction a testator who entrusts execution to his debtor may intend no extinguishment, seems too clear for argument; and it remained for equity to relieve against the law's inequitable fiction. Text authority of distinction[7] clung, indeed, to a general doctrine that the naming of the debtor had the effect of a legacy to the amount of his debt; but its chief proponent so emasculated the rule by exceptions as to leave it without meaning.[8] Nor did the cases afford more than a shred[9] of support for such a principle. And for centuries now, the chancery courts have raised, as against a debtor executor, a trust for a legatee of an amount certain.[10] Whether the rule was the same as to residuary bequests was once doubtful,[11] but it is now clear that no distinction is to be taken on the point.[12] And even where there is no disposition of the residue, an executor's claim against himself is deemed a trust for the next of kin.[13] But if the proper evidence shows an intent in fact to release, there is of course no equity to bind the executor.[14] By statute in England all these chancery principles are recognized at law.[15]

In this country the earlier English[16] refinements have had little following. The courts of many states, both at law and in equity, have held a claim against a debtor executor or administrator assets in his hands for legatees as well as creditors.[17] In other jurisdictions legislation has attained the same result;[18] in some it has even declared such an obligation to be money received.[19] Under statutes of the latter type it may be necessary to hold a personal representative and his sureties liable to the full value of the claim, even though he was insolvent at appointment.[20] But to go this length, as some authority has done, at common law[21] or

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[3] Nedham's Case, *supra.*
[4] 2 BL. COMM. 512.
[5] Holliday *v.* Boas, 1 Roll. Abr. 920 [Executors, G., 13].
[6] Stapleton *v.* Truelock, 3 Leon. 2 pl. 6; Flud *v.* Rumney, Yelv. 160.
[7] BUTTER, Co. LITT., 264 *b* (n. 1); TOLLER, EXECUTORS, 6 ed., 349.
[8] TOLLER, EXECUTORS, 6 ed., 349.
[9] Powis, J., in Wankford *v.* Wankford, 1 Salk. 299, 303.
[10] Phillips *v.* Phillips, 2 Freem. Ch. 11.
[11] Brown *v.* Selwin, Cas. Temp. Talb. 240, 242.
[12] Errington *v.* Evans, 2 Dick. 456.
[13] Carey *v.* Goodings, 3 Bro. C. C. 110.
[14] Strong *v.* Bird, L. R. 18 Eq. 315.
[15] 36 & 37 Vict. ch. 66, § 24.
[16] Thomas *v.* Thompson, 2 Johns. 471; Robinson *v.* Hodgkin, 99 Wis. 327.
[17] Crow *v.* Conant, 90 Mich. 247.
[18] N. J., GEN. STAT. 1896, 1426, § 8.
[19] OHIO, BATES' ANN. STAT. 1897, § 6069.
[20] Treweek *v.* Howard, 105 Cal. 434. *Cf. contra,* McCarty *v.* Frazer, 62 Mo. 263, 265. In New York the executor is liable as for money received. Baucus *v.* Stover, 89 N. Y. 1. But his sureties are not, unless at some time during the administration the principal was solvent. *In re* David's Estate, 44 N. Y. Misc. 337.
[21] Wright *v.* Lang, 66 Ala. 389.

under statutes adopting the common-law rule[22] cannot be correct. To say that what should be discharged has been discharged, may be useful; but to assume that what cannot be paid has been paid, is absurd. And in a discussion as to what the law ought to be, it is reasoning in a circle to argue that sureties contract with knowledge of what the law is,[23] and should not, therefore, be surprised at being held accountable for personal obligations as well as for official acts. The correct, and happily the more general, view is forcibly put in a recent Illinois decision. *Wachsmuth* v. *Penn Mutual Life Ins. Co.*, 89 N. E. 787 (Ill.).

CHANGE OF BUSINESS AS AFFECTING LIABILITY TO BE MADE AN INVOLUNTARY BANKRUPT. — The Bankruptcy Act of 1898 provides that, "any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading," and certain other pursuits, owing debts to the amount of one thousand dollars or over, "may be adjudged an involuntary bankrupt." [1] Under this provision, the question has frequently arisen as to the effect of a change by the debtor, prior to the petition, from an occupation of the exempt class to one of the non-exempt class, or *vice versa*. The Supreme Court has not yet passed on the question; while the decisions in the lower federal courts are so far from harmonious that there are three distinct tests, by no means consistently applied, as to the time as of which the debtor's character is to be determined. (1) The date of the petition. This accords with the literal language of the Act,[2] with the general rule of law that jurisdiction is settled as of the date of the commencement of proceedings,[3] and with the analogous cases of change of domicile;[4] and it is usually applied where the debtor is in a non-exempt class at the date of the petition.[5] The courts generally refuse, however, to grant a debtor exemption merely because he is in the exempt class on the day of the petition, even though *animo manendi*, in order to prevent an embarrassed debtor from rendering his preferential transfer unimpeachable.[6] But this departure, although reaching a desirable result, is clearly a judicial amendment of the statute. (2) The date of the act of bankruptcy. Unless this test, which is applied to a change either to a non-exempt [7] or to an exempt occupation,[8] is qualified, as intimated in some of the cases,[8] by the proviso that the debtor must have been in the exempt class both at the date of the act of bankruptcy and for a reasonable time prior thereto, it

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[22] Judge of Probate *v.* Sulloway, 68 N. H. 511.

[23] Treweek *v.* Howard, *supra*.

[1] § 4 *b*.

[2] See definition 10 in the Act, and § 4 *b*.

[3] *Cf.* Mollan *v.* Torrance, 9 Wheat. (U. S.) 537; *Re* New England Breeders' Club, 165 Fed. 517.

[4] McConnel *v.* Kelley, 138 Mass. 372. *Cf.* Robinson *v.* Hughes, 117 Ind. 293.

[5] *Re* Matson, 123 Fed. 743; *Re* Interstate Paving Co., 171 Fed. 604. See Hoffschlaeger Co. *v.* Young Nap, 12 Am. B. R. 521. *Cf.* Butcher *v.* Easto, 1 Dougl. 295.

[6] *Re* Luckhardt, 101 Fed. 807, 809.

[7] Flickinger *v.* First Nat'l Bank, 145 Fed. 162; Olive *v.* Armour & Co., 167 Fed. 517. See Tiffany *v.* La Plume Condensed Milk Co., 141 Fed. 444, 448.

[8] *Re* Luckhardt, *supra*. See *Re* Hoy, 137 Fed. 175; *Re* Pilger, 118 Fed. 206.